

VIA ECFS

EX PARTE

April 28, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Dkt. No. 08-49*

Dear Ms. Dortch:

Earlier today, Julia Strow, Vice President of EAS Consulting, Inc. and an outside consultant to Cbeyond, Inc. and One Communications Corp., and the undersigned, representing Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp., and tw telecom inc., met separately with Mark Stone, Legal Advisor to Commissioner Adelstein, and Jennifer Schneider, Legal Advisor to Acting Chairman Copps, regarding the above-referenced proceedings.

The participants urged the Commission to adopt the standard for assessing incumbent LEC petitions for forbearance from unbundling obligations that was proposed by a coalition of competitors, including Cbeyond, Integra, One Communications and tw telecom, on March 26, 2009. Copies of the documents distributed at each meeting are attached.

Please do not hesitate to contact me if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones
Nirali Patel

April 28, 2009
Page 2

*Counsel for Cbeyond, Inc., Integra Telecom, Inc.,
One Communications Corp. and tw telecom inc.*

cc (via email): Mark Stone
Jennifer Schneider

Proposed Standard For Consideration of Petitions for Forbearance from Unbundling Obligations

Petitions for forbearance from Section 251(c)(3) unbundling obligations filed pursuant to Section 10 of the Act shall be considered on a Metropolitan Statistical Area (“MSA”) basis. In determining what level of competition in the MSA is sufficient under Section 10, the Commission should determine, for each MSA in which forbearance is sought, whether

(1) there are at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market (“Wholesale Test”);

or

(2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant downstream product market to the locations in question via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market (“Retail Test”).

A petition shall only be granted if either the Wholesale Test or the Retail Test is satisfied in an MSA for a relevant product market. The FCC shall forbear from enforcing the incumbent LEC’s Section 251(c)(3) unbundling obligation only in the product market in which the Wholesale Test or Retail Test is satisfied.

For purposes of determining the relevant product market, when applying the Wholesale Test, the FCC shall examine the relevant markets for wholesale loop inputs. When applying the Retail Test, the FCC shall examine the relevant markets for retail services that are provided using UNE loop inputs. The FCC shall treat inputs used to serve residential customers as belonging to a different product market from inputs used to serve business customers. Similarly, the FCC shall treat downstream retail services provided via UNE loops to residential customers as belonging to a different product market from downstream retail services provided via UNE loops to business customers.

In extraordinary circumstances, the FCC may depart from this standard and reach a different conclusion as to whether to grant or deny a petition for forbearance from unbundling obligations than would otherwise apply under this standard.

PRESENTATION REGARDING PROPOSED UNE FORBEARANCE STANDARD

WC Dkts. 08-24, 08-49

(April 28, 2009)

- **Separate Wholesale and Retail Test.** The FCC should establish separate Wholesale and Retail Tests.
- **Use of MSAs.** The FCC should utilize MSAs as the relevant geographic area because competitors (other than perhaps cable operators, which possess economies of scope that cannot be replicated by others as a practical matter) generally must serve a large, economically integrated area similar to an MSA to achieve efficient scale and to serve multi-location small and medium-sized business customers.
- **Relevant Product Markets.** At the very least, the FCC should analyze business and residential markets separately. It may be appropriate to differentiate among product markets within the business and residential categories. In the Wholesale Test, the FCC should analyze the extent to which competitors, using their own loop/transport facilities, provide substitutes for the loop/transport UNE facilities for which forbearance is sought. In the Retail Test, the FCC should analyze the extent to which competitors, using their own loop/transport facilities, provide substitutes for the downstream retail services that CLECs provide via UNEs. Obviously, competition from firms that rely on UNEs, special access, or any other incumbent LEC-provided loop/transport facilities, would not be treated as competitors for purposes of either the Wholesale Test or the Retail Test.
- **Two Non-ILEC Competitors.** Entry by a cable operator, which benefits from unique advantages, is insufficient to demonstrate that it is economic for reasonably efficient competitors to enter the market without UNEs. Also, it is appropriate for the FCC to presume that (1) prices yielded by a duopoly market with high entry barriers will be significantly above cost, and will therefore harm consumer welfare and (2) entry by a third facilities-based competitor will cause prices to decline. The three competitor requirement is conservative because the relevant theoretical and empirical research demonstrates that it is likely that prices would decline further with the entry of other competitors into a three-competitor market.
- **Assessment of Network Coverage.** The assessment of coverage in both tests should count only non-incumbent LECs that have actually deployed loop facilities to end user locations. In applying the Wholesale Test, the FCC should count only wholesalers with sufficient network coverage (75 percent of the MSA) because the transaction costs associated with widespread reliance on two wholesale loop providers in a geographic area are prohibitive. In order to count for purposes of the Retail Test, a competitor need not meet a minimum network coverage within the MSA. The assessment of coverage in the Wholesale Test should count only wholesalers with sufficiently developed wholesale OSS.
- **Market Share Minimums.** The FCC should supplement the network coverage component in the Wholesale Test and Retail Test with a minimal market share requirement to ensure that the competitors that have deployed loop facilities have

achieved at least some success in the relevant market and to increase the chances that the presence of the non-ILEC competitors causes prices to decline.

- **Only Wireline Competitors Count.** Verizon has failed to demonstrate that wireless service is a substitute for most wireline services. Review of Verizon's pricing conduct in Rhode Island, of pricing trends elsewhere in the country (e.g., California) and other available evidence suggests that most wireline subscribers do not view wireless as a substitute.
- **Legal Basis.** The Proposed Standard is fully consistent with the FCC's interpretation of the impairment standard: that there is impairment where it is uneconomic for a reasonably efficient competitor (i.e., one that does not benefit from advantages "not available to other entrants" *TRO* ¶ 98) to enter a market absent the availability of a particular UNE.